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# Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt\*

by Ahmed El-Sayed\*\*

## Abstract

*This paper seeks to address the constitutional paths that followed the Arab awakening in both Tunisia and Egypt. The Tunisian constitutional process, despite some tensions, was largely peaceful and consensual. On the other hand, the process in Egypt of establishing a new constitutional arrangement had been tumultuous with repercussions that are likely to linger on for a protracted period of time. Therefore, despite apparent resemblance in socio-political actors in both countries, (political Islam, army intervention, strong institutional tradition, young population, etc.) the paper aims at identifying the factors have impacted both the constitutional drafting process and the popular perception of the produced constitutions in each of Tunisia and Egypt.*

## I. The Case of Tunisia

### 1. First Stage of Transition: Post Ben Ali

In the aftermath of Ben Ali's departure, Tunisia had to rapidly find a successor for its long-sitting dictator. Seeking to fill political vacuum, Ben Ali's Prime Minister, Mohammed Ghanouchi, declared himself the acting president based on Article 56 of the 1959 Constitution stating that "[I]n case of temporary disability, the President may, by decree, delegate his powers to the Prime Minister [...]". However the application of the Article had two main obstacles; the delegation of power did not actually transpire and, most importantly, the application of such Article would suggest that the absence of the President is temporary, not permanent. Fortunately, the Constitutional Council, the country's ultimate arbiter on constitutional issues at the time,<sup>1</sup> intervened declaring that due to the permanent absence of the president the situation necessitates the application of Article 57<sup>2</sup> and thus the head of the lower

\* This paper does not offer a comprehensive account on the constitutional processes in Egypt and Tunisia but rather an analysis of the significant factors that shaped the constitutional drafting processes.

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<sup>1</sup> Article 75 of the 1959 Constitution stated that:

"The opinion of the Constitutional Council [...] shall be binding on all public authorities [...]."

<sup>2</sup> Article 57 of the 1959 Constitution stated that:

"In case the Presidency of the Republic becomes vacant on account of death, resignation, or permanent disability, the Constitutional Council shall meet immediately and pronounce the permanent vacancy by absolute majority of its members [...] the President of the Chamber of Deputies [...] shall be invested immediately with the functions of Interim President of the Republic for a period of at least 45 days and at most 60 days [...]."



chamber of parliament, not the prime minister, should serve as interim president. Accordingly, Fouad Mebazaa, was declared the interim president of the country.<sup>3</sup> Therefore, despite a mercurial beginning,<sup>4</sup> Tunisia's institutions were able to overcome the very first test and found a replacement for the fleeing President premised on constitutional legitimacy.

Striving to handle the new polity, on 18 February the government founded the High Commission for the Realization of Revolutionary Goals, Political Reforms, and Democratic Transition.<sup>5</sup> Even from the lengthy title, it could be deduced that the commission's aim was to accommodate the demands of the newly unfolding socio-political forces.<sup>6</sup> In particular, the Commission's initial role was to provide a platform of representation for the various ... of Tunisian society.<sup>7</sup> Nevertheless, the government soon realized that although constitutional legitimacy was sufficient to provide an interim president, it was certainly not enough for the sustainability of the entire political system. The death of at least three protesters prompted the Prime Minister, who had served under Ben Ali, to tender his resignation.<sup>8</sup> Only days later, Mebazaa declared a future roadmap, set a date for the election of a National Constituent Assembly (NCA) that would draft a new constitution and ignored the 45- 60 day constitutional limit<sup>9</sup> on his interim presidency.<sup>10</sup> Mebazaa decisively stated that the 1959 Constitution "no longer reflects the aspirations of the people after the revolution",<sup>11</sup> paving the way for the Decree-Law No. 2011-14 which abolished the 1959 Constitution in its entirety.<sup>12</sup> Moreover, the High Commission, which was initially formed to play an advisory role, assumed more powers and "effectively operated as an unelected parliament."<sup>13</sup>

This hybrid of constitutional and revolutionary legitimacy (legitimacy of transition) gave the system whose President and post-revolution Prime Ministers were either closely related to Ben Ali's regime, Mebazaa and Ghannouchi,<sup>14</sup> or not among the participants of the 2011 revolution,

<sup>3</sup> "Tunisia Constitutional Council Appoints Interim Head of State," Voice of America, accessed March 5, 2014 <http://www.voanews.com/content/former-tunisian-president-arrives-in-saudi-arabia----113775734/133570.html>.

<sup>4</sup> Laurel Miller et al, *Democratization in the Arab world: prospects and lessons from around the globe* (RAND: Santa Monica, CA, 2012), 72.

<sup>5</sup> Asma Nouira, "Obstacles on the Path of Tunisia's Democratic Transformation," Carnegie Endowment For International Peace: Sada, accessed March 5, 2014, <http://carnegieendowment.org/2011/03/30/obstacles-on-path-of-tunisia-s-democratic-transformation/6bej>.

<sup>6</sup> Bruce Maddy-Weitzman, "Tunisia's Morning After: Middle Eastern Upheavals," *Middle East Quarterly*, volume XVIII, No 3 (Summer 2011) 11-17, 14.

<sup>7</sup> Bruce Maddy-Weitzman, *supra* n.6, 14

<sup>8</sup> "Tunisian PM Mohammed Ghannouchi Resigns over Protests," BBC, accessed March 5, 2014, <http://www.bbc.co.uk/news/world-middle-east-12642942>.

<sup>9</sup> Article 57 of the 1959 Constitution, *supra* n.2.

<sup>10</sup> "Tunisia President Fouad Mebazaa Calls Election," BBC, accessed March 5, 2014, <http://www.bbc.co.uk/news/world-middle-east-12642942>.

<sup>11</sup> "Tunisia President Fouad Mebazaa Calls Election," *supra* n.10.

<sup>12</sup> The preamble to the Decree-law no. 201114 dated 23 March 2011 stated that:

"Considering that the current situation [...] does no longer allow the regular operation of the public authorities and that the full implementation of the constitution provisions has become impossible." Article one on the same Decree-Law also stated "The public authorities in the Republic of Tunisia shall be provisionally organized in accordance with the provisions of this decree [...]."

<sup>13</sup> Laurel Miller et al, *supra* n.4, 72.

<sup>14</sup> See e.g. Kim Willsher, "Tunisian Prime Minister Mohamed Ghannouchi Resigns amid Unrest," *The Guardian*, accessed March 5, 2014.

(El-Sebsi)<sup>15</sup> an opportunity to run the country until the election of the NCA. However, this relatively fragile system faced a veritable test when elections were delayed from July until October upon the request of the Independent High Authority for Elections (ISIE).<sup>16</sup> Officially this decision, which the government was not in favor of, was purely due to technical difficulties.<sup>17</sup> Some surmise that the underlying motive for the delay was to allow non-Islamist parties, who lacked any organizational advantage, more time to prepare for the election.<sup>18</sup> Be that as it may, the decision, which was approved by the High Commission<sup>19</sup> and initiated by the ISIE (whose 16 members were appointed by the High Commission),<sup>20</sup> questioned the authority of the Commission and the scope of its mandate.<sup>21</sup> Rejecting the decision, El-Nahda, Tunisia's main Islamist party, suspended its participation in the High Commission until the election date was concretized.<sup>22</sup> However, El-Sebsi, the sitting prime Minister, was able to develop "enough credibility that by June he was able to persuade the public and the parties to accept a postponement [...] Tunisia's Islamists, who had the most to lose [...] accepted the deferral."<sup>23</sup>

However, the High Commission was able to offer crucial services for the transitional process. Most importantly, it drafted "a law governing the election of a Constituent Assembly [NCA]"<sup>24</sup> and, as already mentioned, appointed the members of the ISIE, which administered the electoral process.<sup>25</sup> Ultimately, both the Commission and the government managed to move forward despite a number road blocks<sup>26</sup> and Tunisia was able to hold its first fair and free elections in October 2011. This election ushered in the second stage of the transitional process, this time the country would be run, perhaps for the first time ever, by elected officials.

<sup>15</sup> "Interim Tunisian Leader With Ties to Old Ruler Defends a Gradual Path," *NY Times*, accessed March 5, 2014, <http://www.nytimes.com/2011/10/04/world/africa/tunisias-interim-leader-essebsi-defends-gradualistpath.html?pagewanted=all&r=0>.

<sup>16</sup> "Tunisia's Interim Government Delays Election," *BBC*, accessed March 5, 2014, <http://www.bbc.com/news/world-middle-east-13702372>.

<sup>17</sup> "Tunisia's Interim Government Delays Election," *supra* n.16.

<sup>18</sup> Erik Churchill, "Tunisia's Electoral Lesson: The Importance of Campaign Strategy," *Carnegie Endowment For International Peace: Sada*, accessed March 5, 2014, <http://carnegieendowment.org/2011/10/27/tunisia-s-electoral-lesson-importance-of-campaign-strategy/6b7g>. Although it is to be noted that among those who opposed the delay was the Progressive Democratic Party (PDP), a secular party. Laurel Miller et al., *supra* n.4, 72.

<sup>19</sup> "Tunisian Interim Government Delays Constituent Assembly Elections," *World Socialist Web Site*, accessed March 5, 2014, <http://www.wsws.org/en/articles/2011/06/tuni-j29.html>.

<sup>20</sup> "Its [ISIE] members were not elected, but appointed by the High Authority for the Realization of the Goals of the Revolution, Political Reforms, and Democratic Transition." *Elections in Tunisia: Selection of the New Independent High Authority for Elections Frequently Asked Questions* (International Foundation for Electoral Systems: Middle East and North Africa, January 24, 2014), 2.

<sup>21</sup> Laurel Miller et al, *supra* n.4, 72.

<sup>22</sup> "Key Tunisian Party Pulls out of Election Talks," *Financial Times*, accessed March 5, 2014, <http://www.ft.com/intl/cms/s/0/744473ac-8ba0-11e0-a725-00144feab49a.html#axzz2v6oHtAQM>.

<sup>23</sup> "Interim Tunisian Leader With Ties to Old Ruler Defends a Gradual Path," *NY Times*, accessed March 5, 2014, <http://www.nytimes.com/2011/10/04/world/africa/tunisias-interim-leader-essebsi-defends-gradualistpath.html?pagewanted=all&r=0>.

<sup>24</sup> Laurel Miller et al, *supra* n.4, 72.

<sup>25</sup> Laurel Miller et al, *supra* n.4, 72.

<sup>26</sup> For instance, the Commission could not entertain some of demands to devise supra-constitutional principles to restrict the conduct of the Constituent Assembly in the drafting process. Laurel Miller et al., *supra* n.4, 73-74.

## 2. Remarks on the First Stage of the Transition

The most remarkable feature and what largely distinguishes Tunisian politics from most of the Arab world and Africa is the largely apolitical role of the army.<sup>27</sup> The Tunisian army has proven that it well earned the title of the dormant giant.<sup>28</sup> Even with the political vacuum caused by the unanticipated escape of Ben Ali, the army still abstained from taking part, at least overtly, in the political process. Some expected that even with the un-politicized track record of the army, it would have been challenging for an army that was developed in a secular tradition to risk allowing religious powers to take hold of the country. Nevertheless the military kept a distance from politics, sending a message that "Tunisian republicanism will continue to uphold the values of liberty, brotherhood, and equality, but add religion, reflecting a willingness to coexist with the social and political realities of the country."<sup>29</sup> Such message set the stage for a political competition where no one should anticipate an outsider's help i.e. from the army.

Secondly, although political instability had inflicted heavy costs on the country's security and economy, it rendered the governing system susceptible to pressure and more attentive to the demands of the political forces. Therefore, it was no surprise that at an early stage Ben Ali's Prime Minister had to resign,<sup>30</sup> the 1959 Constitution was abolished<sup>31</sup> and the High Commission, which provided an adequate representation of the Tunisian society, assumed the role of a parliament.<sup>32</sup> In addition, the transitional authority did not stay for long in power, the transition from Ben Ali to the NCA had transpired in almost ten months (from January to October 2011). Therefore, both flexibility and the relatively rapid hand over of power to an elected body allowed the Tunisian system to avoid collapse and serious challenges to its governing legitimacy.

Regarding the NCA, in addition to its basic mission to draft a constitution, the NCA was given the power to both decide its bylaws and run the country throughout the second phase of transition.<sup>33</sup> Given these expansive powers, the NCA was designed to be an extremely powerful institution with no clear limitations on the discharge of such powers. Accordingly, it was quite foreseeable that the NSA's design would allow for two potential pitfalls; drafting a constitution based on political weight not consensualism<sup>34</sup> and the absence of accountability criteria.<sup>35</sup> Even though the main political parties agreed that the NSA's mandate should not exceed one year, the agreement was "non-binding and many people assume that it will not be honored."<sup>36</sup>

<sup>27</sup> See Yezid Sayigh, "The Tunisian Army—A New Political Role?," *Carnegie Endowment for International Peace*, accessed March 6, 2014, <http://carnegieendowment.org/2011/10/31/tunisian-army-new-political-role/8msb>.

<sup>28</sup> Yezid Sayigh, *supra* n.27.

<sup>29</sup> Yezid Sayigh, *supra* n.27.

<sup>30</sup> "Tunisian PM Mohammed Ghannouchi Resigns over Protests," *supra* n.8.

<sup>31</sup> The preamble to the Decree-law no. 201114 dated 23 March 2011, *supra* n.12.

<sup>32</sup> Laurel Miller et al, *supra* n.4, 72.

<sup>33</sup> Daphne McCurdy, A Guide to the Tunisian Elections (Project on Middle East Democracy, October 2011), 3.

<sup>34</sup> See Zaid Al-Ali and Donia Ben Romdhane, Tunisia's new constitution: progress and challenges to come (open democracy, February 2014), 2.

<sup>35</sup> Laurel Miller et al, *supra* n.4, 76.

<sup>36</sup> Daphne McCurdy, *supra* n.33, 3.

"All political parties represented in the High Authority for the Achievement of Revolutionary Objectives [High Commission], except for the Congress for the Republic (CPR), signed a declaration on Sept 15, 2011, limiting the timeframe of



### 3. Second Stage of Transition: Power Structure under the NCA

On November 14, the ISIE declared the results of the October 23 National Constituent Assembly election. Out of 217 seats, El-Nahda (Tunisia's main Islamic party) came in first with 89 seats (41%) and Congrès pour la République (CPR) came second with only 29 seats.<sup>37</sup> Despite El-Nahda's comfortable victory, it was not sufficient for the party to rule alone. At an early stage, therefore, the election outcome forced political actors to play politics not ideology; majority is required to control, coalition is required to obtain majority and compromise is the key to pour ideologically-diverse, lacking majority political parties into a coalition. Furthermore, parties had to consider consensus seriously, not only because of its validity as a constitutional-building foundation, but also because it seemed the only way to deliver in a fractured political setting.

These two considerations, which may appear as two sides of the same coin, played out robustly in the conduct of the NCA both politically and procedurally. Regarding the former, an otherwise unlikely coalition, known as Troika, was forged between El-Nahda, CPR and Ettakattol (left-wing secular parties) reaching a majority of 139 seats.<sup>38</sup> This coalition was further manifested in the distribution of what was called "the three presidencies" even before the convocation of the NCA.<sup>39</sup> Following the Troika agreement,<sup>40</sup> the NCA elected the president of republic, prime minister and head of the NCA from the CPR, El-Nahda and Ettakattol respectively. Procedurally speaking, although it was only required to obtain absolute majority vote (fifty percent + 1) to approve a constitutional article, the draft constitution in its entirety had to pass two-thirds majority (145 votes out of 217) to become a constitution.<sup>41</sup> Otherwise, two failures of the draft to pass this threshold would trigger a popular referendum on the draft. If the draft that failed to pass by NCA went to popular referendum, the party unwillingly to make compromises during the drafting process would be perceived by the public as a consensus-hampering force, with the potential to suffer serious political losses.<sup>42</sup>

In respect of the NCA's mandate, the early settlement of the political map allowed the NCA to promulgate the Constituent Law pertaining to the Provisional organization of Public Authorities (provisional constitution also dubbed mini constitution).<sup>43</sup> Article two of the provisional constitution stated that:

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NCA activities to one year." The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress Toward Establishment of Independent Election Management Body (The Carter Center, May 11, 2012), 3.

<sup>37</sup> "National Constituent Assembly Election Results Announced in Tunisia," International Foundation for Electoral Systems, accessed March 6, 2014, <http://www.ifes.org/Content/Publications/News-in-Brief/2011/Nov/National-Constituent-Assembly-Election-Results-Announced-in-Tunisia.aspx>.

<sup>38</sup> Amine Ghali, "Tunisia's Constitutional Process: The Road Ahead," Carnegie Endowment For International Peace: Sada, accessed March 6, 2014, <http://carnegieendowment.org/2011/12/09/tunisia-s-constitutional-process-road-ahead/84zy>.

<sup>39</sup> "Primary agreement on sharing the three presidencies in Tunisia", (in Arabic), DW, accessed March 6, 2014, <http://www.dw.de/اتفاق-مبدئي-على-تقاسم-الرئاسات-الثلاث-في-تونس/a-15543511>; "How Will the First Session of the Constituent Assembly Be Held?", tunisialive, accessed March 6, 2014, <http://www.tunisia-live.net/2011/11/18/how-will-the-first-session-of-the-constituent-assembly-be-held/>

<sup>40</sup> "Primary agreement on sharing the three presidencies in Tunisia", supra n.39.

<sup>41</sup> Article three of the Constituent Law pertaining to the Provisional organization of Public Authorities (Tunisian Provisional Constitution)

<sup>42</sup> See n. 85 and related text.

<sup>43</sup> "Tunisian Assembly Adopts Provisional Constitution," Al Jazeera English, accessed March 6, 2014, <http://www.aljazeera.com/news/africa/2011/12/2011121150150490.html>.

The NCA assumes the primary responsibility of drafting a constitution for the Tunisian republic and assumes specifically the following tasks:

Exercising legislative authority

Electing the president of the NCA

Electing the president of the republic

Monitoring the government performance [emphasis added]

Accordingly, after the October election, Tunisia had a fully-fledged parliament, provisional constitution, Constituent Assembly and, though indirectly, an elected Prime Minister (hailing from the majority party) and a president.<sup>44</sup> A complete state structure, therefore, existed after the election where the NCA remained the most powerful institution exercising both constitution-making and parliamentary functions.<sup>45</sup> Accordingly, the claim that Tunisia decided to promulgate a constitution before parliamentary and presidential elections<sup>46</sup> may be questionable.

The second legal document that governed the drafting process, in addition to the provisional constitution, was the NCA's rules of procedure (henceforth bylaws).<sup>47</sup> Most importantly, the bylaws established a Joint Committee for Coordination and Drafting (JCCD) to, inter alia, coordinate between constitutional committees and prepare a final draft of the constitution (Art. 103 and 104). Nonetheless, whether in the provisional constitution or the bylaws, there was no "legal obligation to complete the draft constitution by a given deadline."<sup>48</sup>

The first real test of ideologies and readiness to compromise was soon to materialize; the role of Shari'a in the new constitutional order. Before the October election, El-Nahda's position was to maintain the wording of Article one of the 1959 Constitution, which recognized Islam as the religion of the country, without seeking any constitutionalization of Shari'a.<sup>49</sup> After the election, nevertheless, there were indicators that party would prefer granting Shari'a the status of a source or even the main source of legislation.<sup>50</sup> Such uncertainty led to heated debate, resulting in weeks of pro- and anti-Shari'a street protests.<sup>51</sup> Ettakattol took a firm position declaring its withdrawal from the Troika coalition should there has been any mention of Shari'a in the constitutional draft.<sup>52</sup>

<sup>44</sup> "Tunisian assembly elect Moncef Marzouki as interim president" *The National*, accessed March 6, 2014, available at <http://www.thenational.ae/news/world/middle-east/tunisian-assembly-elect-moncef-marzouki-as-interim-president>;

"Tunisia's first democratically elected government sworn in", *France24*, accessed March 6, 2014, available at <http://www.france24.com/en/20111225-tunisia-new-government-sworn-in-office-carthage-presidential-palace-jebali>.

<sup>45</sup> The NCA was as its name suggested "a constituent assembly, and not merely a constitutional convention." Bill Proctor and Ikbal Ben Moussa, *The Tunisian Constituent Assembly's By-laws: A Brief Analysis* (International Institute for Democracy and Electoral Assistance, September 2012), 15.

<sup>46</sup> E.g. Jason Gluck, *Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia* (United States Institute of Peace, April 2011).

<sup>47</sup> Rules of Procedure adopted on 16 December 2011. For detailed information about the NCA's rules of procedure see Bill Proctor and Ikbal Ben Moussa, *supra* n.45.

<sup>48</sup> Bill Proctor and Ikbal Ben Moussa, *supra* n.45, 12.

<sup>49</sup> Duncan Pickard, "The Current Status of Constitution Making in Tunisia," *Carnegie Endowment for International Peace*, accessed March 28, 2014, <http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia/ah1s>.

<sup>50</sup> For example "[a]t a protest on March 16, the president of the Ennahda parliamentary group, Sahbi Atig, shouted that sharia would be 'the main source of legislation' [...]" Duncan Pickard, *supra* n.49.

<sup>51</sup> Duncan Pickard, *supra* n.49.

<sup>52</sup> Duncan Pickard, *supra* n.49.

Facing escalating pressure, El-Nahda felt the need to end the debate stating that the party would not pursue any Shari'a stipulation in the constitution referencing a number of reasons including; an ambiguous referral to Shari'a might lead to misinterpretation by the judiciary or public and the need to focus on the country's more pressing issues.<sup>53</sup> Al-Ghanouchi, the founder of El-Nahda, in what seems to be a leaked video, provided an arguably more sincere and honest reason; in his response to a Salafi sheik, Al-Ghanouchi said "in practice what makes laws is not the constitution but the balance of power",<sup>54</sup> and that when Tunisian society is ready, Article one will be enough to promulgate Islam-based laws.<sup>55</sup>

Be that as it may, at an early stage, El-Nahda successfully evaded a major landmine that could have brought the Troika coalition to an end. Nonetheless, a more intricate challenge of a political nature was yet to come, namely the type of the political system to be established. This challenge, unlike the question of Shari'a, was considerably time and effort consuming,<sup>56</sup> with El-Nahda insisting on a parliamentary system with a weak, indirectly elected president, while other civil and secular parties, including the ones in the ruling Troika coalition, favoring semi or fully presidential system.<sup>57</sup> All concerned parties cited reasons justifying their positions, for instance El-Nahda stated that the parliamentary paradigm is more compatible with the Islamic principle of Shura, consultation, and thus inherently worthy of being adopted.<sup>58</sup> In fact, while acknowledging the validity of some reasons mentioned in support of one system or another, it is reasonable to believe that each side was acting in accordance with its own narrow party interest. El-Nahda, which garnered 40% of the NCA seats, believed that in a fractured political setting, this percentage would still grant it the leading position. Despite polarization, other secular and civil parties hoped to overcome their differences and agree on a candidate who would be capable of reaping the remaining 60% of the votes.<sup>59</sup>

In the meanwhile, other factors contributed to further widen the gap between Islamists and secularists. In fact, there was a growing conviction that the El-Nahda led government was intentionally reluctant to take any legal or political action vis-à-vis radical and violent groups "to cultivate deniable 'proxies' with which to intimidate political opponents."<sup>60</sup> Against this backdrop, the assassination of opposition leader Chokri Belaid (February 2013) largely shattered the already fragile trust between both camps.<sup>61</sup>

<sup>53</sup> Duncan Pickard, *supra* n.49.

<sup>54</sup> "Communication téléphonique entre Rached Ghannouchi et Béchir Ben Hassine," *businessnewscomtn*, [Video file- in Arabic], retrieved from <https://www.youtube.com/watch?v=2S-PLXId6Aw>.

<sup>55</sup> "Communication téléphonique entre Rached Ghannouchi et Béchir Ben Hassine," *businessnewscomtn*, *supra* n.54.

<sup>56</sup> A few days before the voting on the final constitutional draft, the NCA voted down Article 90 that distributes powers between the president and the prime minister. Duncan Pickard, "Voting on the Tunisian Constitution," *Atlantic Council*, accessed March 28, 2014, <http://www.atlanticcouncil.org/blogs/menasource/voting-on-the-tunisian-constitution>.

<sup>57</sup> Duncan Pickard, *Lessons from Constitution-Making in Tunisia* (Atlantic Council, September 2012), 3-4.

Bill Proctor and Ikbal Ben Moussa, *supra* n.45, 12.

<sup>58</sup> Duncan Pickard, *supra* n.57, 3.

<sup>59</sup> Duncan Pickard, *supra* n.57, 3-4.

<sup>60</sup> "Why Tunisia's leaders must resist urge for power grab", *CNN*, accessed March 5, 2014, <http://edition.cnn.com/2013/02/13/opinion/tunisia-political-crisis/>.

<sup>61</sup> "Tunisia: Chokri Belaid assassination prompts protests," *BBC*, accessed March 15, 2014, <http://www.bbc.com/news/world-21349719>.

In an attempt to restore confidence, Prime Minister Hamadi Jebali, from El-Nahda party, called for a “non-partisan, technocratic government”.<sup>62</sup> Nonetheless, failing to secure support from his party, he was forced to resign and another Islamist took over, Ali Larayedh.<sup>63</sup> It is true that El-Nahda refused to accommodate the opposition’s strong demand to form a technocratic government, but the NCA’s bylaws did witness a very significant amendment; the Joint Committee of the NCA was replaced by a “Consensus Committee, in which each political group was given equal weight to all others.”<sup>64</sup> This step managed to restore much of the needed confidence and the Committee was entrusted to work on the June 2013 constitutional draft hoping to resolve lingering political disagreement.<sup>65</sup>

Nonetheless, further setbacks were yet to transpire both regionally and domestically. The ouster of the regime of the Muslim brotherhood (MB) in Egypt, the assassination of the second opposition leader Mohamed Brahmi (July 2013),<sup>66</sup> and the killing of eight army soldiers (July 2013)<sup>67</sup> gravely exacerbated the situation between the Islamists and secularists, leading to mass street protests and full suspension of the NCA in August 2013.<sup>68</sup> Fearing the worst and seeking to contain the political crisis, the El-Nahda government declared the Salafist *Ansar al-Shari’a* a terrorist group, a decision that irreversibly<sup>69</sup> ended the so called “accommodationist” approach that El-Nahda was pursuing towards extreme Salafist groups but did little to fix the deteriorated political status quo.<sup>70</sup>

Given the failure of political players to maintain a trustworthy relationship, actors of civil society felt the necessity of their intervention. Tunisia’s “largest trade unions, the lawyers association, and one of the country’s largest human rights associations (who were together referred to as the ‘Quartet’)” brokered negotiations between the government and the opposition, which led to a reconciliatory agreement.<sup>71</sup> The most important term of the agreement was the consent of El-Nahda to form a technocratic government;<sup>72</sup> only then did the process pick up, leading to the adoption, with 200 votes from 216, of a permanent constitution; the Tunisian Constitution of 2014.<sup>73</sup> Ultimately, an overwhelming consensus had been achieved

<sup>62</sup> “Tunisia: Ali Larayedh named new prime minister”, *BBC*, accessed March 5, 2014, <http://www.bbc.com/news/world-africa-21550375>.

<sup>63</sup> “Tunisia: Ali Larayedh named new prime minister”, *supra* n.62.

<sup>64</sup> Zaid Al-Ali and Donia Ben Romdhane, *supra* n.34, 3.

<sup>65</sup> Alexis Arieff and Carla E. Humud, *Political Transition in Tunisia* (Congressional Research Service, January 2014), 3-4.

<sup>66</sup> “Since Brahmi’s July assassination and the military’s overthrow of the Muslim Brotherhood in Egypt, the positions of Tunisia’s secular opposition have hardened considerably.” Anouar Boukhars, *In the Crossfire: Islamists’ Travails in Tunisia* (Carnegie Endowment For International Peace, January 2014), 9.

<sup>67</sup> “Eight Soldiers Killed in Chaambi Mountain Attack,” *tunisia-live*, accessed March 6, 2014, <http://www.tunisia-live.net/2013/07/29/eight-soldiers-killed-in-chaambi-mountain-attack>.

<sup>68</sup> “Tunisia constituent assembly suspended pending talks”, *BBC*, accessed March 6, 2014, <http://www.bbc.com/news/world-africa-23596640>.

<sup>69</sup> The crackdown on Salafists effectively started after an attack on the U.S. Embassy in September 2012. Alexis Arieff and Carla E. Humud, *supra* n.65, 7.

<sup>70</sup> See Anouar Boukhars, *supra* n.66, 9.

<sup>71</sup> “Islamist Party in Tunisia to Step Down,” *NY Times*, accessed March 6, 2014, [http://www.nytimes.com/2013/09/29/world/africa/islamist-party-in-tunisia-to-step-down.html?\\_r=0](http://www.nytimes.com/2013/09/29/world/africa/islamist-party-in-tunisia-to-step-down.html?_r=0).

<sup>72</sup> “Mehdi Jomaa takes office [10 Jan 2014] to lead caretaker government until elections as part of democratic transition agreement.” “Tunisia’s new prime minister takes office,” *Aljazeera*, accessed March 11, 2014, <http://www.aljazeera.com/news/africa/2014/01/tunisia-new-prime-minister-takes-of>.

<sup>73</sup> “Tunisia assembly passes new constitution,” *BBC*, accessed March 6, 2014, <http://www.bbc.com/news/world-africa-23596640>.

in a considerably fractured, polarized, post-revolution political stage, ushering in the third and hopefully the final stage of transition, i.e. parliamentary and presidential elections.

#### 4. Successful Transition

##### *a) Contingency Approach*

The largely successful Tunisian experience begs the question: what made it work in Tunisia and not elsewhere is the Arab awakening countries? The answer seems to lie in the organizational management concept of contingency:

According to the contingency approach there are no plans, organisation structures, leadership styles, or controls that can be applied under all conditions. Instead, every management situation must be approached with the "it all depends attitude".... Managerial action, thus, depends upon circumstances within a given situation. No one best approach will work in all situations. Applying a contingency/situational approach requires that managers diagnose a given situation and adapt to meet the conditions present.<sup>74</sup>

Being mindful of this notion, the Tunisian administration of the transitional period could be largely deemed contingency-oriented; in a sense that a host of decisive measures were tailored to meet the exigencies of the moment with neither political fixation nor legal stubbornness. This ability to mostly act timely and adequately largely shaped the course of the whole process and set the stage for establishing consensus. In other words, the relative success of the Tunisian case was, at least partially, an outcome of institutional behavior and conscious decisions that rendered consensus a prerequisite for a legitimate and peaceful transition. While acknowledging the importance of other factors that further boosted a consensual solution such as the presence of an accommodating and moderate leader like Al-Ghanouchi of the El-Nahda party, the ouster of former President Morsi in Egypt and the high level of awareness of the Tunisian society,<sup>75</sup> the next section sheds light on other decisions and factors that played a substantial role in neutralizing the danger of the tyranny of the majority.<sup>76</sup>

##### *b) Consensus: Reality not a Choice*

The core factor that enabled Tunisia to wade through its second stage of transition was the unwavering need to maintain consensus. As challenging as it was, consensus was not a matter of choice but rather a reality that political actors had to submit to due to a number of well thought out decisions, and factors that further boosted the need for political inclusiveness.

*Electoral Formula:* In his detailed analysis, John M. Carey presents a staggering fact, had Tunisia "chosen the other most common formula for converting votes to seats, the *d'Hondt Divisor*

<sup>74</sup> V S P Rao & Hari V Krishna, *Management: Text and Cases*, (Excel Books: New Delhi, 2005), 84.

<sup>75</sup> E.g. David Pollock, "First Islamist Party to Voluntarily Give Up Power: A New Tunisian Model?," *The Washington Institute*, accessed March 5, 2014, <https://www.washingtoninstitute.org/policy-analysis/view/first-islamist-party-to-voluntarily-give-up-power-a-new-tunisian-model>.

<sup>76</sup> "[...] majoritarian systems not tempered by constitutional restraints on the exercise of power have a tendency to denigrate into a 'tyranny of the majority.' It is this tension between majoritarian sovereignty and minority protection that has marked democratic theory from its very beginning."

Ebrahim Afsah, "Constitution-Making in Islamic Countries- A Theoretical Framework," in Rainer Grote & Tilmann Röder (eds.) *Constitutionalism in Islamic countries: between upheaval and continuity* (Oxford: Oxford University Press, 2012), 491.



(D'HD) method – Ennahda would have won 69% of the Assembly seats and been in a position to impose a new constitution unilaterally.”<sup>77</sup> In fact, the Tunisian High Commission opted for an electoral formula known as *Hare Quota with Largest Remainders (HQ-LR)*, which was advantageous to small parties and substantially affected the eventual political landscape. Therefore El-Nahda, which garnered 37% of votes in the October 2011 election, only occupied around 41% of the NCA seats.<sup>78</sup>

*Moderates versus Secularists:* The protagonists of the second phase were the Islamists of El-Nahda on the one hand, and civil and liberal forces on the other. The absence of the Tunisian army from the political game made it clear to secular forces that they had to fight their battles on their own without outside help. Nonetheless, it was not only the army that was out of the scene. The usually disregarded decision of Tunisian government, prior to the October election, to ban Salafist groups from running elections<sup>79</sup> had an equal impact on political Islam in Tunisia.

Post-revolution, Tunisia witnessed a boom in the number of political parties representing all walks of life.<sup>80</sup> Nevertheless, based on Tunisia’s political party law, “a number of Islamist political parties were not granted party accreditation in order to contest the elections, including Hizb Al-Tahrir [...]”<sup>81</sup> Initial estimates tended to underestimate the influence and number of Salafist groups<sup>82</sup> but the “rise of salafism in Tunisia has been both surprising and problematic.”<sup>83</sup> No one can predict what the result would have been had radical groups been allowed to run elections; but as a result, El-Nahda lost a potential ally that could have boosted the position of political Islam in the NCA.<sup>84</sup> On the contrary, the failure to translate the presence of the Salafi groups into seats in the NCA completely dismissed the subsequent rapprochement between El-Nahda and Salafism as a sponsorship of radicalization, not as an alliance between two political parties.<sup>85</sup>

*Need to Reach Consensus Shaped the Procedure of the NCA:* The abovementioned measures had, at least in part, affected the electoral outcome. Islamists came in short of achieving a qualifying majority, triggering the need for a coalition with ideologically different parties and promoting rhetoric of consensus. The most important manifestation of this tendency was Article two of the provisional constitution, which necessitated the approval of two-thirds + one of the NCA to pass the constitution. Setting a high bar meant that the only way to prove their

<sup>77</sup> John M. Carey, *Electoral Formula and the Tunisian Constituent Assembly* (Dartmouth, May 2013), 1.

<sup>78</sup> John M. Carey, *supra* n.79.

<sup>79</sup> Kevin Casey “A Crumbling Salafi Strategy,” *Carnegie Endowment For International Peace: Sada*, accessed March 5, 2014 <http://carnegieendowment.org/sada/2013/08/21/crumbling-salafi-strategy/gjkq>.

<sup>80</sup> “Whereas only nine registered political parties contested elections under Ben Ali’s regime, post-revolutionary Tunisia boasted 113 registered political parties and independents.” Laryssa Chomiak, *Countries at the Crossroads: Tunisia* (Freedom House, 2012), 3.

<sup>81</sup> Laryssa Chomiak, *supra* n.80, 3-4.

<sup>82</sup> E.g., Moncef Marzouki, the president of Tunisia once commented of Salafists saying “they are a tiny minority within a tiny minority.” “Violent tide of Salafism threatens the Arab spring,” *The Guardian*, accessed March 10, 2014, <http://www.theguardian.com/world/2013/feb/09/violent-salafists-threaten-arab-spring-democracies>.

<sup>83</sup> Stefano M. Torelli, Fabio Merone and Francesco Cavatorta, “Salafism in Tunisia: Challenges and Opportunities for Democratization,” *Middle East Policy*, volume XIX, No 4 (Winter 2012), 1.

<sup>84</sup> While acknowledging that the majority of the Salafist groups do not recognize modern political structure, an ideological shift could have happened, similar to Egypt, if they were given the chance to participate in the NCA election to draft the constitution.

<sup>85</sup> See “Why Tunisia’s leaders must resist urge for power grab”, *supra* n.60.

trustworthiness political parties had to reach consensus. The referral to a public referendum would have been construed as a failure of the participant parties to resolve their disagreements. For that reason, the Joint Committee was replaced by the Consensus committee where political parties were equally represented to facilitate the creation of consensus.<sup>86</sup>

**Absence of Time Limit:** In hindsight, the absence of a time limit on the work of the NCA had benefited the process. Having to deliver within certain time frame could have led to a hasty outcome, legal impasse, or questioning the legal legitimacy of the process by surpassing the deadline. The absence of such restriction allowed the NCA the time to overcome many of the tensions it encountered and to reach *modus vivendi*, allowing for a consensual constitution.

**Civil Society and Nida Tounis:** The presence of strong labor unions, syndicates, and a vibrant civil society in general, made it possible for civil actors to sponsor negotiations that led to the process-saving agreement between the opposition and the government. This role was best complemented by the political counterweight introduced to the stage by the emergence of Nida Tounis under the leadership of El-Sebsi which eventually offered a platform for the fractured civil and secular opposition.<sup>87</sup> This political balance rendered consensus a desirable and safer option rather than a public referendum with unpredictable results.<sup>88</sup>

## II. The Egyptian Case

### 1. Post Mubarak

Though the first political role of the Egyptian army dates back to 1881, such role was usually justified, specifically in 1881<sup>89</sup> and 1952, to intercept foreign interference or end occupation. Therefore, it was no surprise that Egyptian protestors were jubilant to see army troops, even prior to declaring any positions, on the street during the course of the 2011 revolution.<sup>90</sup> Building on this psyche, neither Mubarak nor Egyptians found it problematic to mandate the Supreme Council of the Armed Forces (SCAF), which is not mentioned in any form in the 1971 Constitution, to run the transitional period.<sup>91</sup> The reported role of the army in toppling Mubarak,<sup>92</sup> barren political life, the leaderless revolution, and the notorious reputation of the

<sup>86</sup> Zaid Al-Ali and Donia Ben Romdhane, *supra* n.64.

<sup>87</sup> By April 2013, Nida Tounis was “running almost even with Ennahda in all public opinion polls.” Marina Ottaway, *Learning Politics in Tunisia*, (Wilson Center, April 2013), 2; Anouar Boukhars, *supra* n.66, 9.

<sup>88</sup> Arguably, the rising popularity of Nida Tounis had deterred El-Nahhda from considering a public referendum as a no vote could have probably largely boosted the position of Nida Tounis at the expense of El-Nahhda.

<sup>89</sup> E.g. “In 1881 Egyptian army officers led by Arabi Pasha went into open revolt. This was a genuine nationalist movement against all foreign interference in Egyptian affairs [...]” Roger Parkinson, *The late Victorian Navy: The pre-dreadnought era and the origins of the First World War* (Woodbridge, UK: Boydell Press, 2008), 48.

“The Nasserite era [named after Jamal Abdel Nasser the actual leader of the 1952 coup d’état] [...] overthrew the Egyptian monarchy and government, ended the occupation of the British [...]” Amal Treacher Kabesh, *Postcolonial masculinities: emotions, histories and ethics*, (Farnham, Surrey: Ashgate, 2013), 120.

<sup>90</sup> “Egyptian military became one of the heroes of the 2011 revolution [...]” The now-famous cries from the demonstrators—“The army and the people are one hand!” William J Dobson, *The dictator’s learning curve: Tyranny and democracy in the modern world* (London: Vintage Books, 2013), 255.

<sup>91</sup> In a televised speech, Omar Suliman, Mubarak’s vice president declared that Mubarak waived the office of presidency and delegated the SCAF to run the country’s affairs. “Hosni Mubarak resigns as president,” *Aljazeera*, accessed March 5, 2014 <http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html>.

<sup>92</sup> Paul Danahar, *The new Middle East: The world after the Arab Spring*, (New York: Bloomsbury Press, 2013), 56.

1971 Constitution, specifically after the 2005 and 2007 amendments,<sup>93</sup> rendered the non-constitutional rule of the SCAF justified if not welcomed.

Few days after Mubarak's departure, the SCAF timed its political role to six months, suspended the 1971 Constitution, and appointed a committee of experts to introduce a number of amendments to the suspended constitution.<sup>94</sup> Amending the Constitution appeared to be an awkward decision for, at the very least, two main reasons; the sheer breach of the suspended constitution should have led to its demise not amendment and the irony of reviving a constitution that did not mention the SCAF, even by way of example, in any constitutional clause, let alone the ruling of the country. Nevertheless, almost five weeks after toppling Mubarak, the SCAF held a constitutional referendum on March 19, 2011 (hereinafter March referendum) where voters were required to either approve or disapprove eight amendments to the 1971 Constitution and an abrogation of one of its articles.

The amendments and the abrogation were overwhelming approved by almost 77% of the voters.<sup>95</sup> It was thus reasonable to expect the reinstatement of the 1971 constitution. However, the SCAF, finally realizing the impossibility of reinstating a constitution that did not recognize the junta, in a tragicomic twist, declared on the SCAF Facebook page that the 1971 Constitution was replaced by a new constitutional declaration (provisional constitution).<sup>96</sup> The so called constitutional declaration committed four travesties that completely dismissed any validity of the constitutional referendum. Firstly, the referendum included an abrogation of Article 179 of the 1971 Constitution which meant that abolishing a constitutional article required popular approval.<sup>97</sup> However, although the 1971 Constitution was 211 articles, the constitutional declaration was only 63 articles and thus, unilaterally, the SCAF repealed tens of articles without any popular consultation.<sup>98</sup> Secondly, although the declaration's articles were mostly derived from the replaced constitution, sometimes they were considerably different.<sup>99</sup> Thirdly, in order to authorize the SCAF's ruling of the country until the election of the two chambers of parliament and a president, brand new articles, such as Article 61, was added.<sup>100</sup> Fourthly, and most ironically, an approved article by the referendum was amended arbitrarily by the SCAF. The approved wording of Article 189 stated that "[B]oth the president, after the consent of the cabinet of ministers, and half the members of the chambers of parliament have the right to request a new constitution [...]" in contrast, according to Article 60 of the declaration, only the

<sup>93</sup> E.g. Dafna Hochman Rand, *Roots of the Arab Spring: Contested authority and political change in the Middle East* (Philadelphia: University of Pennsylvania Press, 2013), 64-65.

<sup>94</sup> "On February 13, 2011, the SCAF dissolved parliament and suspended the 1971 constitution. It then established an eight-member committee of experts to draft amendments to that constitution." *Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013* (International Foundation for Electoral Systems, October 2013), 2.

<sup>95</sup> *Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013*, *supra* n.94.

<sup>96</sup> Nathan J. Brown and Kristen Stilt, "A Haphazard Constitutional Compromise," *Carnegie Endowment for International Peace*, accessed March 28, 2014, <http://carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise/2q1>.

<sup>97</sup> Nathan J. Brown and Kristen Stilt, *supra* n.96.

<sup>98</sup> Nathan J. Brown and Kristen Stilt, *supra* n.96.

<sup>99</sup> Some of these changes are substantively significant, "such as to Article Five of the 1971 constitution dealing with political parties[...]Presumably, the SCAF only later realized it wanted to amend these clauses, but it did so without any additional explanation or justification." Nathan J. Brown and Kristen Stilt, *supra* n.96.

<sup>100</sup> Article 61 stated:

"The Supreme Council of the Armed Forces will continue directly with its limited responsibilities following this Declaration, until the time at which the People's Assembly and the Shura Council assume their responsibilities and the president of the republic is elected and assumes his/her position."

SCAF could start the process of drafting the constitution within six months of the election of chambers of the parliament.<sup>101</sup>

Regardless of its questionable procedural legitimacy, the declaration in practice had a number of significant repercussions; on the whole, whoever was in power could promulgate an edict and call it a constitutional declaration; secondly, it set in motion a roadmap for the transitional period. The roadmap provided that a parliament of two chambers were to be elected, the non-appointed parliamentarians would then elect (within six months of their election) a constituent assembly to draft a new constitution (within 6 months of its formation) and then a presidential election.<sup>102</sup> Therefore, though the SCAF retained its political influence until the end of the transition, the parliament was to possess the power of legislation and the competence to elect the Egyptian Constituent Assembly (ECA).

According to the roadmap, consequently, the next step to be followed was the parliamentary election. Nevertheless, arguably, prior to the election, Egypt was living a cold war atmosphere with three sets of overlapping and conflicting interests. Islamists -mainly Muslim Brotherhood (MB) and Salafists- intoxicated by their overwhelming success in manipulating a yes vote for the March referendum<sup>103</sup> were squarely sure about their sweeping victory and demanded to run parliamentary elections as soon as possible. However, being aware of the material and political weight of the SCAF, they mostly maintained an appeasement approach.<sup>104</sup> Civil and the so-called revolutionary forces, vanquished in their campaign for a 'no vote' for the March amendments,<sup>105</sup> lacking organizational structure or popular support, were stuck between a rock, the SCAF ruling, and a hard place, running elections and incurring defeat before Islamists. The SCAF, despite its tremendously rapid drain of popularity,<sup>106</sup> could not let the army's institutional interests up in the air to be decided by whoever would come to power.

Few days prior to the Lower House election a very illuminating development took place. The government introduced what became known as Elselmy Document, which contained a set of principles to serve as supra-constitutional clauses to restrain the prospective ECA.<sup>107</sup> In summary, the document granted the army an autonomous status and largely sought to preserve a civil character for the state.<sup>108</sup> The document provoked wide-spread criticism

<sup>101</sup> Article 60 of the March 2011 Constitutional Declaration stated that:

"The members of the first People's Assembly and Shura Council (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a constituent assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum."

<sup>102</sup> Article 60 of the March 2011 Constitutional Declaration, *supra* n.101.

<sup>103</sup> "Muslim Brotherhood have abused the vote [...] they have used the slogan, 'Yes, with Allah', [...] distributing leaflets saying that approving the proposed amendments to the constitution is a religious obligation." Rosemary Sabet, *From Trafalgar to Tahrir* (Authorhouse, 2012), 126; "Egyptian Voters Approve Constitutional Changes," *NY Times*, accessed March 6, 2014, <http://www.nytimes.com/2011/03/21/world/middleeast/21egypt.html?pagewanted=all&r=0>.

<sup>104</sup> Nael Shama, *Egyptian foreign policy from Mubarak to Morsi: Against the national interest* (London; New York: Routledge, Taylor & Francis Group, 2014), 223.

<sup>105</sup> Rosemary Sabet, *supra* n.103, 125-127.

<sup>106</sup> Rosemary Sabet, *From Trafalgar to Tahrir*, *supra* n.103, 125 and 129.

<sup>107</sup> Nael Shama, *Egyptian foreign policy from Mubarak to Morsi: Against the national interest*, *supra* n.104, 223.

<sup>108</sup> For instance Article one of the document stated that "[T]he Arab republic of Egypt is a civil and democratic state [...]" For full text of the Elselmy Document see "The Text of the Basic Principles of the Constitution," Almasry Alyoum, accessed March 5, 2014, <http://www.almasryalyoum.com/news/details/103142>.

especially and conceivably from the Islamists who viewed the document as lose-lose situation; favoring the army and the civil forces.<sup>109</sup> Under threats to resort to the street, the government declared that the document was advisory and not binding.<sup>110</sup> However, in a clear show of force Islamists organized a mass protest in Tahrir square. The message was clear; no imposition of supra-constitutional principles because they (Islamists) were sure that they would dominate the drafting process and they rejected any potential restrictions on their discretion without obtaining any benefits in return.<sup>111</sup> Other civil and purportedly revolutionary forces, incapable of organizing any sizable protest on their own, joined the Islamists' protest.<sup>112</sup> Eventually, Islamists left Tahrir square after delivering their message while other forces ended up in bloody clashes with the security forces in what is widely known as Mohamed Mahmoud Confrontations.<sup>113</sup> Therefore, while the Islamists showed considerable ability to mobilize the street, self-claimed revolutionary forces were consumed in street clashes with no clear agenda nor popular support and apparent failure to prepare for the parliamentary election.<sup>114</sup>

## 2. Remarks on the First Stage of the Transition

Unlike Tunisia, the Egyptian army was the ruler of the first transitional period. The legitimacy of the SCAF's role was hardly challenged in the beginning given its reported role in toppling Mubarak and popular perception of the army as the country's savior. The warm reception of the army led to the SCAF's refusal to hand over power to a presidential council.<sup>115</sup> In fact, the SCAF's deluded confidence in unconditional popular support led to its full embroilment in politics. Nevertheless, as the SCAF was part and parcel of the political fray pursuing its interests, it quickly became an easy target for political onslaught. In addition, instances of disproportionate use of force and sheer scale of insecurity rendered the SCAF's administration incompetent causing a tremendous legitimacy drain that could not be harnessed by its farcical constitutional declarations.

For Islamists, the vehement pursuit of political Islam, in the run up for March referendum, to turn rivalry into an ideological one rather than political was indicative that a political coexistence between civil and religious forces in Egypt was by default evasive.<sup>116</sup> To rub salt in the wound, the misadministration of the SCAF further worsened the case. The failure to engage a body representative of various social and political forces (similar to the Tunisian High Commission) in the administration of the transitional period majorly harmed the SCAF itself, undermined civil forces and paved the way for street mobilization and mass protests. Faced by

<sup>109</sup> Nael Shama, *supra* n.104, 223.

<sup>110</sup> "Islamists Lead a Massive Protest in Cairo," *The Wall Street Journal*, <http://online.wsj.com/news/articles/SB10001424052970203611404577046093603733830?mg=0.html>

<sup>111</sup> See "Egypt's Islamists dominate Tahrir Square's dense Friday protest," *Ahram online*, accessed March 5, 2014, <http://english.ahram.org.eg/NewsContent/1/64/26902/Egypt/Politics-/Islamists-dominate-Egypt-Tahrir-Squares-dense-Fri.aspx>.

<sup>112</sup> See "Islamists Lead a Massive Protest in Cairo," *supra* n.110; "Egypt's Islamists dominate Tahrir Square's dense Friday protest," *supra* n.111.

<sup>113</sup> Nael Shama, *supra* n.104, 223.

<sup>114</sup> Despite that liberal forces would have relatively benefited from El-Slemy Document, they joined the Islamists' protests and ended up, without the Islamists, clashing with the security forces. Unlike Islamists, their demands were unclear, marred with violence and ignored the upcoming parliamentary elections. Contrary to this opinion, some perceive these aimless confrontations to be Egypt's second revolution. See Nael Shama, *supra* n.104, 223-224.

<sup>115</sup> The demand of forming a presidential council to run the country instead of the SCAF was strongly pursued by a number of political actors. Mohamed El-Bendary, *The Egyptian Revolution: Between hope and despair: Mubarak to Morsi* (New York: Algora Publishing, 2013), 148.

<sup>116</sup> Rosemary Sabet, *supra* n.103, 126.



their inability to compete either politically or at the street level (protests), the so-called revolutionary forces devoted their efforts to media talks, pointless confrontations with security forces or, sometimes, pressing for demands that would only benefit political Islam.<sup>117</sup> The fine lines between freedom, chaos, and anarchy were repeatedly crossed amid praise of the secularly-oriented media.<sup>118</sup> Moreover, disregarding Article four of the army's declaration which banned "exercising any political activity or establishing political parties on a religious foundation [...]" allowed political Islam to fully display its force whether in its propaganda or in the establishment of religious-oriented political parties.<sup>119</sup>

Lastly, the parliament was assigned to elect the ECA. Therefore, political Islam was not only given the mandate to legislate but also to draft the country's constitution; a conclusion that was enough, per se, to exacerbate the acrimony between religious/non-religious forces and fuelled an allegation that the SCAF conducted an illicit deal with the MB.<sup>120</sup>

### 3. Early Confrontation: Islamists versus Judiciary

As expected, after a lengthy parliamentary election, the MB led coalition and the Islamic bloc won 47% and 27% of the Lower Chamber and 47% and 25% of the Upper house seats<sup>121</sup> respectively.<sup>122</sup> After such political annihilation, in practice, taking about consensus seemed to be illusionist. Especially after the political alliance between the MB and the Islamic bloc (mainly the Salafist Al-Nour party). Therefore, it was no surprise that the parliament elected an ECA dominated by Islamists.<sup>123</sup> In the meanwhile, the parliament started to adopt an anti-judiciary rhetoric, calling for its cleansing and the sacking of the attorney general.<sup>124</sup> Although it was no more than non-binding speeches or recommendations, it created a feeling that the judiciary was next, after sidelining civil and liberal forces. Yet, the first direct confrontation took place when the Egypt's Administrative Court ruled the dissolution of the ECA on the basis that its members should not be the same members of parliament.<sup>125</sup> The decision raised questions about the competence of the Administrative Court to disqualify a parliamentary act. Nevertheless, the decision was not challenged.<sup>126</sup>

<sup>117</sup> For instance, early 2012 some of the youth and non-Islamic forces were protesting to force the SCAF to hand over power to the head of the Lower House, SAAD Elkatatny, who hailed from the MB. Amre Elshobaky, "A Revolution of Lost Opportunities," Alarabiya, (in Arabic), accessed March 6, 2014, <http://www.alarabiya.net/ar/politics/2014/01/23/الفرصة ضائعة.html>.

<sup>118</sup> Amre Elshobaky, *supra* n.117.

<sup>119</sup> E.g. "Radial Islamist groups gaining stranglehold in Egypt," *The telegraph*, accessed March 6, 2014, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8457030/Radial-Islamist-groups-gaining-stranglehold-in-Egypt.html>.

<sup>120</sup> Nael Shama, *supra* n.104, 223.

<sup>121</sup> "Results of Shura Council elections," Carnegie Endowment for International Peace, accessed March 6, 2014, <http://egyptelections.carnegieendowment.org/2012/02/29/results-of-shura-council-elections>.

<sup>122</sup> "The High Commission Declares the Results for the Lower House Lists [...] FJP 127, Al-Nour 96 and Elkotla 33," *Almasry Alyoum* (in Arabic), accessed March 6, 2014, <http://www.almasryalyoum.com/news/details/146347>.

<sup>123</sup> Paul Danahar, *supra* n.92, 109.

<sup>124</sup> For instance, the parliamentary defense committee called for the sacking of the Attorney General which is considered a judicial position in the Egyptian system. "Parliament Committee Calls for Sacking Attorney General," *Almasry Alyoum*, accessed March 6, 2014, <http://www.almasryalyoum.com/news/details/149602>.

<sup>125</sup> "The court order stated that parliament must elect 100 'qualified' people from outside the parliament to write the constitution." "Court disbands Egypt's constitutional group," *CNN*, accessed March 6, 2014 <http://edition.cnn.com/2012/04/11/world/africa/egypt-cons>.

<sup>126</sup> See Paul Danahar, *supra* n.92, 109.

Paradoxically, the composition of the second ECA again included members of parliament<sup>127</sup> which led many observers to expect a second dissolution of the ECA.<sup>128</sup> In fact, a dissolution decision was on the horizon, but this time targeting the Lower Chamber. In June 2011, the Supreme Constitutional Court (SCC) issued a decision disbanding the Lower Chamber due to the unconstitutionality of the parliamentary electoral law.<sup>129</sup> The SCC decided that the electoral law violated Art 38 of the constitutional declaration which stated that “the law shall organize the right of nomination to both Councils of People [Lower Chamber] and Consultation [Upper Chamber] pursuant to an electoral system that combines closed parties lists and individual system with two-thirds percentage [devoted] for the first and the remaining one-third for the second.”<sup>130</sup> Contrary to the article, the repealed law allowed political parties to run for all the seats, including the one-third devoted to individual nominees. Therefore, according to the SCC, and a neutral reading of the article, the law violated the constitutional article.

Nevertheless, the Islamists deemed the decision a stab in the back for a number of valid considerations. Firstly and most importantly, the decision could have invalidated the result for the one-third of the seats- for which the electoral law contravened the constitutional restriction allowing political parties to run for seats allocated for independent candidates- and upheld the other two-thirds. Dissolving the entire parliament seemed to be a judicial encroachment on the legislature especially that the Court’s justification for nullifying the parties’ two-thirds was largely based on logic not law.<sup>131</sup> Moreover, the decision came against a backdrop of rising tension between the MB, on one hand, and the SCAF and the judiciary on the other.<sup>132</sup> Consequently, the decision largely appeared retaliatory or even politicized.<sup>133</sup> Thirdly, although it is true that the decision was not without a precedent or legal validity,<sup>134</sup> the 2011 parliament was a genuinely democratically elected parliament, unlike its predecessors. Therefore, even given the unconstitutionality of the law, overriding the expressed will of millions of voters due to a legislative error could objectively be considered manipulative and undemocratic. Be that as it may, the Lower Chamber was dissolved with expectations for the Upper House, which was formed pursuant to the same unconstitutional law, to face the same destiny.

<sup>127</sup> “The second Constituent Assembly has been dogged by similar legal challenges [the one that dissolved the first].” William Partlett, “Constitution-Making by ‘We the Majority’ in Egypt,” *Brookings*, accessed March 6, 2014, <http://www.brookings.edu/blogs/up-front/posts/2012/11/30-constitution-egypt-partlett>.

<sup>128</sup> The legality of the second ECA was referred to the SCC in October 2013. “Egypt’s constitutional assembly case referred to Supreme Court,” *Alarabiya*, accessed March 6, 2014, <http://english.alarabiya.net/articles/2012/10/23/245476.html>; Paul Danahar, *supra* n.92, 109.

<sup>129</sup> Bassam Tibi, *The Sharia state: Arab Spring and democratization* (London: Routledge), 141.

<sup>130</sup> Originally this Article gave the legislature the discretion to decide any electoral system for the parliamentary elections. However, on 25 December 2011, the SCAF issued a second constitutional declaration to amend this Article.

<sup>131</sup> The SCC stated that the competition of political parties on the one third, which was devoted to individual candidates, had affected the formation of the political parties’ lists for the other two-thirds. “The Reasons for Dissolving the People’s Assembly,” (in Arabic) *Al-Watan*, accessed March 6, 2014, <http://www.elwatannews.com/news/details/15636>.

<sup>132</sup> Before the dissolution decision, the MB made assertions that the SCAF threatened to dissolve the government if the MB and its political party continued their insistence to dismiss the government. “MPs inch closer to vote of no-confidence in El-Ganzouri government” *Ahramonline*, accessed March 5, 2014, <http://english.ahram.org.eg/NewsContent/1/64/38042/Egypt/Politics-/MPs-inch-closer-to-vote-of-noconfidence-in-ElGanzo.aspx>.

<sup>133</sup> Paul Danahar, *supra* n.92, 109.

<sup>134</sup> The SCC “in 1987 and 1990 it forced the dissolution of parliament on precisely such grounds. (It struck down the parliamentary electoral framework a third time in 2000 on different grounds.)” Nathan Brown, “Judicial Turbulence Ahead in Egypt, Fasten Your Seat Belts,” *Carnegie Endowment For International Peace*, accessed March 5, 2014, <http://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts/b689>.

#### 4. A Wasted Opportunity of Reconciliation

In the meanwhile, the country was consumed with a confrontation of a different type; the second round of the presidential election between the MB's candidate, Mohamed Morsi and Mubarak's last serving prime minister, Ahmed Shafeik. Apart from the adherents of political Islam, the country was almost divided between the appeal of stability, promised by Shafeik, and the fear of restoring Mubarak's regime. The former fear was common between both Islamists and civil forces. Being mindful of the ferocity of the second round, both camps (Islamists and civil) seized the rare opportunity and exchanged promises of support and reconciliation. In the Fairmont meeting, named after the hotel where it was held, many representatives of the civil forces declared their clear support of Morsi and the MB, on their part, promised to reconsider the composition of the CA to be more representative of Egypt's various forces.<sup>135</sup> Acting on its own, the SCAF continued its ludicrous tradition, and on the eve of the final day of the presidential election declared the fourth of its so-called constitutional declarations.<sup>136</sup> The edict reassigned the legislative power to the SCAF until the election of a parliament and provided immunity for SCAF's officials.<sup>137</sup>

A few days later, the winner of the presidency was declared; Morsi with a razor-thin margin, 51.73%,<sup>138</sup> became Egypt's first democratically elected president in a free election. Morsi's victory temporarily ended the bitter division between pro- and anti-Islamists with hopes that the new president might work on healing the social rift in Egyptian society. Unlike Morsi's unsuccessful and controversial step of re-establishing the dissolved parliament,<sup>139</sup> his decision to abolish the SCAF's latest edict quickly portrayed him as a capable and courageous president.<sup>140</sup> By the same token, Morsi issued an edict, also calling it a constitutional declaration, claiming the SCAF's legislative power for himself and abolishing the SCAF's immunity.<sup>141</sup> Immediately after, Morsi sacked the long sitting Minister of Defense, army commander of chief and other top officers, and appointed Abdel-Fatah El-Sisi as the new Defense Minister.<sup>142</sup>

Morsi's edict was widely praised amid claims that it put an end to the protracted political role of the army. To a high extent, Morsi benefited from the temporary alliance with civil forces and the collapsing popularity of the SCAF and the army's political interference. Therefore, hardly anyone did question the authority of his edict especially that it came on the ruins of another self-claimed, unpopular declaration. However, it seemed that Morsi disregarded these factors and believed that he, per se, could actually have become a constitutional authority. Although Morsi at this point possessed both executive and legislative powers, by the virtue of his first edict, he issued a second one. Again calling it a constitutional declaration, this time Morsi

<sup>135</sup> "Once election allies, Egypt's 'Fairmont' opposition turn against Morsi," *Ahram online*, accessed March 5, 2014, <http://english.ahram.org.eg/NewsContent/1/152/74485/Egypt/Morsi,-one-year-on/-Once-election-allies,-Egypt-Fairmont-opposition-.aspx>

<sup>136</sup> Nael Shama, *supra* n.104, 222.

<sup>137</sup> Nael Shama, *supra* n.104, 222.

<sup>138</sup> Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013, *supra* n.94, 6.

<sup>139</sup> Bassam Tibi, *supra* n.129, 142.

<sup>140</sup> Nael Shama, *supra* n.104, 222.

<sup>141</sup> Nael Shama, *supra* n.104, 222.

<sup>142</sup> Nael Shama, *supra* n.104, 222.

granted himself powers that were never, at least overtly, available to any of Egypt's presidents including the SCAF. The Reichstag Fire-type edict stated that:

Previous constitutional declarations, laws, and decisions made by the president since he took office on 30 June 2012, until the constitution is approved and a new People's Assembly [Lower Chamber] is elected, *are final and binding by themselves and cannot be appealed by any way or before any entity. Nor shall they be suspended or cancelled and all lawsuits related to them and brought before any judicial body against these decisions are expired.* (Article two) [Emphasis added]

No judicial body can dissolve the Consultative Council [Upper Chamber] or the Constituent Assembly. (Article five)

In other words, after two edicts, Morsi wanted to possess unquestionable constitutional, legislative, executive, and administrative competences. With no need for deep analysis, this edict was a cure for all the fears of political Islam. There was a fear of dissolving the ECA because its second formation included members of parliament which, as already mentioned, was the same reason for dissolving the first ECA, and the 6-month period for drafting a constitution was about to expire. Besides, the unconstitutional electoral law that led to the dissolution of the Lower Chamber was the same law that applied to the Upper Chamber and thus the dissolution of the latter was inevitable.<sup>143</sup> Accordingly Article five came to stem these fears. Moreover, shielding Morsi's decisions against any review or scrutiny was construed as a pretext to, at the least, re-establish the dissolved Lower Chamber. The edict was thus seen as a letter of intention of the MB that ended the short-lived honeymoon with civil forces, and threatened state institutions and a wide segment of Egyptians.<sup>144</sup> However, shortly under the pressure of popular protests, Morsi issued his third and last constitutional declaration that repealed the earlier one.<sup>145</sup>

## 5. 2012 Constitution: Reasons of Failure

Failing to impose the dictatorial edict, Morsi and the MB followed a different two-pronged approach; the threatened ECA had to finish the draft constitution as soon as possible and the judiciary had to be silenced. To this end, seeking consensus was not on the agenda; therefore, representatives of other forces, frustrated by the process of drafting, withdrew from the ECA.<sup>146</sup> Instead of seeking reconciliation, the withdrawn representatives were quickly replaced by compliant members and a draft constitution was ready before the deadline. The hasty drafting process was most ironically manifested in the travesty that Christian Copts in the ECA were eventually represented by a Muslim named Mohamed.<sup>147</sup> Secondly, to stem the fear of any

<sup>143</sup> Daniel L. Tavana, "Party Proliferation and Electoral Transition in Post-Mubarak Egypt," in George Joffé (ed.) *North Africa's Arab Spring* (London: Routledge, 2013), 55.

<sup>144</sup> "Egyptians stage mass protests against Morsi edict," *The Washington Post*, accessed March 5, 2014 [http://www.washingtonpost.com/world/middle\\_east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f\\_story.html](http://www.washingtonpost.com/world/middle_east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f_story.html).

<sup>145</sup> "A look back at Mohamed Morsi's tumultuous year" CCTV, accessed March 5, 2014, <http://english.cntv.cn/program/bizasiaamerica/20130704/102643.shtml>.

<sup>146</sup> "Complaints about Islamist domination of the constituent assembly had led to mass resignations by non-Islamist members and excoriating commentary in the Egyptian public sphere." *The Battle for Egypt's Constitution* (Project on Middle East Democracy, January, 2013), 2.

<sup>147</sup> "Elsawy Declares that He is the Representative of the Church in the Assembly," *Al-Watan*, accessed March 5, 2013, <http://www.elwatannews.com/news/details/86722>.

undesirable judicial decisions, the supporters of political Islam cast a watertight besiege on the SCC to prevent its justices from entering the court until the adoption of a new constitution.<sup>148</sup> In summary, the drafting process of the 2012 Constitution was marred by exclusion and physical transgression on state institutions. Nevertheless, the draft was approved by 63% in a popular referendum.<sup>149</sup> The 2012 Constitution itself was accused numerous of creating a theocratic state. However, an objective reading may reveal that its articles exhibited a “stronger emphasis on religion than the 1971 constitution, yet its character is [was] largely secular.”<sup>150</sup> The Constitution was conservative, perhaps patriarchal,<sup>151</sup> but was not designed to turn the state overnight into a theocracy. Arguably, its main problem for Egyptians was its creation process and the political performance that followed its genesis.

In fact, the conduct of Morsi and his group (MB) was not any different from that of the ECA. Even the main Salafist party, Al-Nour, broke alliance with MB due to allegations of exclusion and MB monopoly.<sup>152</sup> By the end of Morsi’s one year in office, it appeared that Morsi and MB were threatening opponents through alliances with groups that have black records in violence and terrorism.<sup>153</sup> In one of his last decisions, Morsi crossed the lines of absurdity and appointed a governor to the touristic city of Luxor who hailed from the very same group (Gamaa Islamia) that committed the most heinous terrorist attack against tourists, in the modern history of Egypt, in the very same city of Luxor.<sup>154</sup> The instances where political Islam in general, and MB in particular, physically and verbally, indirectly and indirectly, threatened their opponents whether citizens, politicians or state institutions are beyond the scope of this research. However, they were significant enough to loom over and further stigmatize the Constitution of 2012 regardless of its content.

Egypt was marred with a regime acted dictatorially but lacked the qualifications of a dictatorship. The MB regime antagonized state institutions without having control over them, failed on economic and security fronts, alienated most of the segments of the society and paradoxically, commanded support, and claimed democratic mandate. The electoral and

<sup>148</sup> “Supreme Constitutional Court besieged again,” *Daily News Egypt*, accessed March 5, 2014, [www.dailynewsegypt.com/2012/12/16/supreme-constitutional-court-besieged-again/](http://www.dailynewsegypt.com/2012/12/16/supreme-constitutional-court-besieged-again/).

<sup>149</sup> “Egyptian constitution ‘approved’ in referendum,” *BBC*, accessed March 5, 2014, [www.bbc.com/news/world-middle-east-20829911](http://www.bbc.com/news/world-middle-east-20829911).

<sup>150</sup> Holger Albrecht, *Egypt’s 2012 Constitution Devil in the Details, Not in Religion* (United States Institute of Peace, January 2013), 1. Nathan Brown in his comment on the Draft of the 2012 Constitution (that was wholly adopted) mentioned that “[t]his document does not establish a theocracy or anything close to it, but if there is a clear majority party it will enable it to pass a wide range of laws and probably slowly reshape parts of the state apparatus.” Nathan Brown and Eric Trager, “Have We Lost Egypt? A Dialogue on Islamists, Reactionaries, and American Diplomacy” *New Republic*, accessed March 5, 2014, <http://www.newrepublic.com/article/111095/have-we-lost-egypt-islamists-reactionaries-american-diplomacy>.

<sup>151</sup> E.g. Holger Albrecht, *Egypt’s 2012 Constitution Devil in the Details, Not in Religion* (United States Institute of Peace, January 2013).

<sup>152</sup> Under Morsi’s presidency, “Al-Nour felt deceived by the Muslim Brotherhood and openly expressed its fear for the future of their party if the Brotherhood succeeded in its plans to take control over the nation’s resources and key political positions.” Naglaa Mekkawi, “A love, hate relationship: Al-Nour and Egypt’s Muslim Brotherhood,” *Alarabiya*, accessed March 5, 2013, [english.alarabiya.net/en/perspective/alarabiya-studies/2013/08/22/A-love-hate-relationship-Al-Nour-and-Egypt-s-Muslim-Brotherhood.html](http://english.alarabiya.net/en/perspective/alarabiya-studies/2013/08/22/A-love-hate-relationship-Al-Nour-and-Egypt-s-Muslim-Brotherhood.html).

<sup>153</sup> For instance, in one of his last conferences, Morsi gathered a number of hardline Sunni clerics who insulted Morsi’s opponents and Shiites. Giham Shahine, “Morsi ups the ante,” *Al-Ahram Weekly*, accessed March 5, 2013, [www.weekly.ahram.org.eg/News/3069/17/Morsi-ups-the-ante.aspx](http://www.weekly.ahram.org.eg/News/3069/17/Morsi-ups-the-ante.aspx).

<sup>154</sup> “Egypt’s Mohamed Morsi appoints hardline Islamist to govern Luxor,” *The Guardian*, accessed March 5, 2014, [www.theguardian.com/world/2013/jun/17/morsi-appoints-islamist-governor-luxor](http://www.theguardian.com/world/2013/jun/17/morsi-appoints-islamist-governor-luxor); James Tyler Dickovick, *Africa 2013* (Lanham, MD: Stryker-Post Publications, 2013), 44.



constitutional legitimacy largely appeared as tools to impose submission, not governance. In such context, the June 30<sup>th</sup> protests, the pretext for Morsi's ouster, seemed inevitable. Three days after millions of Egyptians took to the streets,<sup>155</sup> the army declared the ouster of Morsi.<sup>156</sup> Regardless of whether it was a coup, good coup,<sup>157</sup> or an answer to people's appeal, the army movement was largely justified, widely supported, and restarted the transitional period.<sup>158</sup>

## 6. A Second Period of Transition

During the same speech declaring Morsi's removal, the Defense Minister announced the suspension of the 2012 Constitution and the intention to form a committee of experts to amend it.<sup>159</sup> Learning from the SCAF's tumultuous experience, this time the power was handed over to an interim president, the head of the SCC who assumed the power to issue constitutional declarations,<sup>160</sup> and a civilian government. On July 8, the interim president declared the governing constitutional declaration which included the roadmap for the transitional period: a committee of 10 experts to suggest amendments to the 2012 Constitution,<sup>161</sup> a committee of 50 representing a spectrum of socio-political powers to review the suggested amendments<sup>162</sup> then, after the adoption of the Constitution, holding parliamentary and presidential elections.<sup>163</sup>

Quickly, in contrast to the media coverage of dispersing violent protests during the SCAF and Morsi rulings,<sup>164</sup> "Most private outlets embraced the government crackdown on Morsi supporters, including by adopting almost verbatim the government's defense of its actions."<sup>165</sup> The killing of more than 50 protestors in front of the club of the republican guards<sup>166</sup> was justified due the aggression of the protestors and their attempt to break into the social club

<sup>155</sup> "We've covered a lot of protests in Egypt since the fall of President Hosni Mubarak, but the last time we'd seen anything on this massive scale was in the days following Jan. 25, 2011, when the revolution started against him." "Reporter's Notebook: Millions March in Egypt Protests," ABC News, accessed March 5, 2014, <http://abcnews.go.com/blogs/headlines/2013/06/reporters-notebook-millions-march-in-egypt-protests/>; "Millions flood Egypt's streets to demand Morsi quit," Reuters, accessed March 5, 2014, <http://www.reuters.com/article/2013/06/30/us-egypt-protests-idUSBRE95Q0NO20130630>; "Protesters across Egypt call for Mohamed Morsi to go," The Guardian, accessed March 5, 2014, <http://www.theguardian.com/world/2013/jun/30/mohamed-morsi-egypt-protests>; "By the Millions, Egyptians Seek Morsi's Ouster," NY Times, accessed March 5, 2014, [http://www.nytimes.com/2013/07/01/world/middleeast/egypt.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/01/world/middleeast/egypt.html?pagewanted=all&_r=0).

<sup>156</sup> Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013, *supra* n. 94, 1.

<sup>157</sup> For the concept of good coups see Francis Ikome, Good coups and bad coups: The limits of the African Union's injunction on unconstitutional changes of power in Africa (Johannesburg, South Africa: Institute for Global Dialogue, 2007).

<sup>158</sup> "On July 3, 2013, General Abdul Fatah al-Sisi, a military general who is Commander-in-Chief of the Egyptian Armed Forces and the Minister of Defense, announced the removal of President Morsi. This was done with a great deal of popular support." Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013 *supra* n.94, 1.

<sup>159</sup> For full speech see "Morsi's Historic Ouster Speech" [Video file- in Arabic] retrieved from <https://www.youtube.com/watch?v=Bm6QSnrx2hs>.

<sup>160</sup> "Morsi's Historic Ouster Speech", *supra* n.159.

<sup>161</sup> Article 28 of the July 8th, 2013 Constitutional Declaration.

<sup>162</sup> Article 29 of the July 8th, 2013 Constitutional Declaration.

<sup>163</sup> Article 30 of the July 8th, 2013 Constitutional Declaration.

<sup>164</sup> Protesters were largely depicted as freedom fighters even if they were seeking to, at the least, besiege state buildings. E.g. the clashes that followed the protestors' attempt to prevent Egypt's prime minister, under SCAF, from entering the cabinet council. "Officials: Egypt protester killed outside Cabinet," USA today, accessed March 5, [www.usatoday.com/news/world/story/2011-11-25/egypt-cabinet/51393332/1](http://www.usatoday.com/news/world/story/2011-11-25/egypt-cabinet/51393332/1).

<sup>165</sup> "Egypt: Freedom in the World 2014," Freedom House, accessed March 5, 2014, [www.freedomhouse.org/report/freedom-world/2014/egypt-0#.UzhH0qiSzzh](http://www.freedomhouse.org/report/freedom-world/2014/egypt-0#.UzhH0qiSzzh).

<sup>166</sup> "Egypt: Conflicting Versions Of Army Killings," Sky News, accessed March 20, 2014, [news.sky.com/story/1113127/egypt-conflicting-versions-of-army-killings](http://news.sky.com/story/1113127/egypt-conflicting-versions-of-army-killings).

carrying weapons.<sup>167</sup> Similar was the coverage of the breaking up of the MB's supporters' sit-in in Raba, which led to the death of hundreds of protestors and tens of officers.<sup>168</sup> In such an atmosphere and severe mood shift the 2014 constitution was drafted.

To the credit of the drafting committee, it represented a wide spectrum of societal forces.<sup>169</sup> However, apart from the one representative of Al-Nour party, the force that once occupied around 75% of the Lower Chamber vanished into thin air.<sup>170</sup> In a dramatic reverse, the power that once excluded everyone was eventually excluded. On January 2014, the draft constitution went through Egypt's third constitutional referendum after the 2011 revolution, where it was passed with 98% of the votes.<sup>171</sup> Despite what seems an absurd percentage there is little evidence that the voting was rigged, especially because opponents (namely the MB supporters) boycotted the referendum due to their non-recognition of the whole process, giving the high percentage of support a considerable credibility.<sup>172</sup>

Ironically, liberal and civil forces who unwaveringly lamented the so-called deal between the SCAF and the MB have offered in the current constitution the same, if not more, advantages to the army. In this regard, Article 234 of the 2014 Constitution, which states that "[t]he appointment of the Defense Minister shall take place after the approval of the Supreme Council of the Armed Force [...]," imposes an unprecedented restriction on the president's discretion to appoint the Defense Minister. Accordingly, it turned out that what the liberals and civil powers lamented was not the deal but the fact, if such purported deal existed, that they were not part of it.

### III. Concluding Remarks

The Tunisian ban on radical groups to form political parties turned out to be crucial for democratic transition, whereas permitting radical groups and religious demagogue in the Egyptian case gave these groups political meritocracy while lacking genuine belief in democracy. Therefore, as intrusive as it may appear, it turned out that banning radical groups or religious propaganda from politics could enhance weak and newly born democracies and not the opposite. Comparing the Tunisian and the Egyptian cases may give further credit to the concept of "Militant Democracy."<sup>173</sup>

Moreover, Tunisia, which is highly deemed to be a success story, did not hold any public referenda. Egypt, on the other hand, conducted three overwhelmingly supported constitutional referenda and is still wading through a protracted transition. This fact, *per se*, may call to

<sup>167</sup> E.g. "Video: masked gunmen between supporters of Morsi during clashes "Republican guard", *Almasry Alyoum*, (in Arabic) accessed March 5, 2014, <http://www.almasryalyoum.com/news/details/232831>.

<sup>168</sup> There is an unsettled debate regarding the actual death toll as while the MB declared that thousands were killed, the Egyptian government insists that the number was in hundreds.

<sup>169</sup> "Rabaa clashes spark outrage, debate over casualties," *Daily News Egypt*, accessed March 20, 2014, <http://www.dailynewsegyp.com/2013/07/27/rabaa-clashes-spark-outrage-debate-over-casualties/>.

<sup>170</sup> "Although Islamists won five popular votes held since 2011, the constituent assembly will have only two Islamists among its 50 members. One belongs to the hardline Salafi Nour party, the other is a former Brotherhood leader now harshly critical of the group he left last year." "Egypt names key constitution panel with few Islamists," *Reuters*, accessed March 25, 2014, [www.reuters.com/article/2013/09/01/us-egypt-protests-constitution-idUSBRE9800C620130901](http://www.reuters.com/article/2013/09/01/us-egypt-protests-constitution-idUSBRE9800C620130901).

<sup>171</sup> "Egypt referendum: '98% back new constitution'," *BBC*, March 30, 2014, [www.bbc.com/news/world-middle-east-25796110](http://www.bbc.com/news/world-middle-east-25796110).

<sup>172</sup> See "Egypt referendum: '98% back new constitution'," *supra* n.171.

<sup>173</sup> For more information see András Sajó (ed.), *Militant democracy* (Utrecht: Eleven International, 2004).

reconsider the significance of referenda of technical nature, such as a constitutional referendum, in a post-conflict society with a high illiteracy rate like Egypt. Similarly, the mere focus on electoral victory as a sole indicator on democracy and legitimacy may need to be re-evaluated. “[I]t seems evident that merely holding elections is insufficient and that additional institutional mechanisms in the form of constitutional restraints are necessary to make it work.”<sup>174</sup> Morsi’s second declaration considerably revealed a disingenuous belief in democratic governance. Accordingly, there was a legitimate fear that Egypt was heading towards majoritarian tyranny rather than a constitutional democracy especially that “[t]here is strong empirical evidence that constitutional liberalism will in time lead towards democracy, but democracy on its own will not necessarily bring constitutional liberalism.”<sup>175</sup> Consequently, following the promulgation of Morsi’s second edict, it was reasonable for a segment of the society to regard the democratically elected president as an illegitimate ruler who was seeking concentration of all power in his hands. By the same token, after Morsi’s ouster, the uninvestigated killing of a number of the MB supporters flagrantly contradicted the most basic principles of accountability and rule of law.<sup>176</sup>

Therefore, arguably, the lack of confidence in the governing regime’s commitment to democratic values and the exclusion of the other were among the main reasons that detracted from the normative value of both the 2012 and 2014 Constitutions. Contrary to the current Tunisian constitution which appeared to be an outcome of a consensual reconciliatory process, the two Egyptian constitutions were recognized as an expression of victory of one force over another; the 2012 Constitution expressed the dominance of a new political power, the Islamists, whereas the 2014 Constitution established a system of powerful and autonomous state institutions including, but not limited to, the army.<sup>177</sup> It is not particularly that the 2012 and 2014 Constitutions were ideologically divergent. The two Constitutions maintained both the precedence of principles of Islamic Shari’a as the main source of legislation,<sup>178</sup> and, at the same time, the secular character of the state. Accordingly, it was more about the modes operandi of the drafting processes and the political environment rather than the actual constitutional texts that affected the perception of the two constitutions. Egypt, to a high extend, has empirically proven that if “the constituent power is used in order to entrench the political programme of the majority and thus exclude the programmes of competing political forces, an important benefit of constitutionalism, namely the possibility of peaceful change, is put at risk.”<sup>179</sup>

Related to the prospects of constitutional implementation, it was insightful that when the constitutional process in Tunisia reached a stalemate, civil society (specifically the labor union

<sup>174</sup> Ebrahim Afsah, *supra* n.76, 491.

<sup>175</sup> Ebrahim Afsah, *supra* n.76, 491.

<sup>176</sup> E.g. Amnesty International’s written statement to the 25th session of the UN Human Rights Council (3 to 28 March 2014) included a plea that “[t]he Egyptian authorities’ unwillingness to investigate human rights violations should not go unchallenged by the international community.” “The Human Rights Situation in Egypt: Amnesty International’s written statement to the 25th session of the UN Human Rights Council (3 to 28 March 2014),” *Amnesty International*, available at <http://www.amnesty.org/en/library/asset/MDE12/008/2014/en/7e6ff337-c5e3-4c71-8113-142181f37944/mde120082014en.html>.

<sup>177</sup> E.g. Nathan J. Brown and Michele Dunne, “Egypt’s Draft Constitution Rewards the Military and Judiciary,” *Carnegie Endowment for International Peace*, accessed March 28, 2014, <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary/gvc8>.

<sup>178</sup> Article two under both constitutions states that “the principles of Islamic Shari’a are the main source of legislation.” This Article, per se, given political will, can fully Islamize the country with no further need for additional articles.

<sup>179</sup> Dieter Grimm, “Types of Constitutions,” in Michel Rosenfeld & András Sajó (eds.) *The Oxford handbook of Comparative Constitutional Law*. (Oxford: Oxford University Press, 2012), 114.

and the lawyers' syndicate) together with an increasingly organized opposition played a major role in reaching a breakthrough agreement. On the contrary, when Egyptians lost faith in the SCAF they voted for the Islamists and when they lost faith in the Islamists they again turned to the army, with no mention of a political party, syndicate or union. What Egypt has been undergoing can hardly be categorized as a political struggle because Egypt so far has not had a political alternative for the Islamists or the army yet. Part of this could be attributed to the pervasive supra-natural savior mentality; the need for a divinely-supported savior or an army supported officer. Where the person who believes in the former is an Islamist, the latter category can include politicians, writers and, ironically, liberals. This analysis may justify, to a certain extent, liberals' shameless support of the army<sup>180</sup> and the strenuous attempt to depict El-Sisi as an incarnation of Nasser.<sup>181</sup> Unfortunately, three years after Mubarak's fall, the impotence of civil political parties can hardly be attributed to Mubarak's iron-fisted regime anymore.

In this regard, Mancur Olson contends in his examination of the logic of collective actions that:

It does not follow that because all of the individuals in a group would gain if they achieved their group objective that they would act to achieve that objective, even if they were all rational and self-interested. *Indeed unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.*<sup>182</sup> [Emphasis added]

Applying this analysis on the Egyptian case, it could be argued that both Islamists and state institutions in Egypt have the advantages of having a limited number of members, when compared to the society, and a degree of physical and/or physiological coercion on their members through exploiting religious zealotry, appeal of group affiliation, disciplinary measures, institutional loyalty, nationalistic rhetoric, etc. On the other hand, it appears that the mechanism or the 'special device' that can translate youth activism and popular dynamism into a political reality is largely missing. Despite that most of these movements have rational demands; mainly democratic governance and social justice, they are unable to materialize into a robust political party or even a lobby. Tunisia, through its professional syndicates and unions, and the emergence of Nida Tounis was able to provide a real competitor for the Islamists and thus balancing the political arena.

Nevertheless, the Egyptian Constitution of 2014 represents a new political structure where power is not concentrated in a single entity or person but rather distributed among a number of state institutions.<sup>183</sup> With this structural change, and expected continuity of youth dynamism and economic pressure, the 2014 Constitution may accommodate the principle of checks and

<sup>180</sup> Negar Azimi, "The Egyptian Army's Unlikely Allies," *The New Yorker*, accessed March 20, 2014, <http://www.newyorker.com/online/blogs/newsdesk/2014/01/why-egypts-liberal-intellectuals-still-support-the-army.html>.

<sup>181</sup> "Egypt wonders if army chief is another Nasser," *The Guardian*, accessed March 23, 2014, [www.theguardian.com/world/2013/aug/07/egypt-morsi-nationalist-general-sisi](http://www.theguardian.com/world/2013/aug/07/egypt-morsi-nationalist-general-sisi).

<sup>182</sup> Mancur Olson, *The logic of collective action: Public goods and the theory of groups* (Cambridge, Mass: Harvard University Press, 1971), 2.

<sup>183</sup> E.g. Nathan Brown, "Egypt Has Replaced a Single Dictator With a Slew of Dictatorial Institutions," *Carnegie Endowment for International Peace*, accessed March 6, 2014, <http://carnegieendowment.org/2014/01/26/egypt-has-replaced-single-dictator-with-slew-of-dictatorial-institutions/gzfe>.

balances leading to a sort of democratic accountability. “It could well happen that a constitution that fell short of achievement developed into a full-fledged constitution over time [...]”<sup>184</sup> However, this leap forward is conditional on one prerequisite; having political parties that can convert enthusiasm and popular engagement into politics. Regarding Tunisia, though it is too early to say that Tunisia has made a successful democratic transition, the culture of consensus created during the drafting process is likely to enable the already progressive constitution of 2014 to establish a constitutional democracy.

<sup>184</sup> Dieter Grimm, “Types of Constitutions,” *supra* n.177, 109.